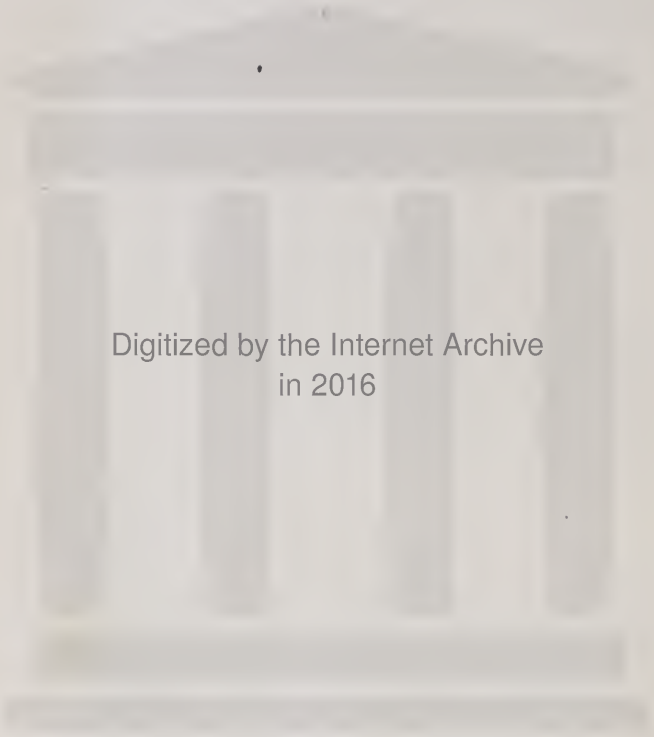

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(North-Eastern Division)

1950

VOLUME I

PART X

THE GOVERNMENT PRINTER, PRETORIA

G.P.-S.9851—1950-1—500.

CASE No. 51 OF 1950.

MZIKAYISE NGCOBO (Appellant) *v.* **MAKOSINI MKIZE (Respondent).**

(N.A.C. CASE No. 48/50.)

PIETERMARITZBURG: Wednesday, 12th July, 1950. Before Steenkamp, President. O'Connell and Van Schalkwyk, Members of the Court (North-Eastern Division).

Judgment delivered at Vryheid on 3rd October, 1950.

Native Law and Custom—Lobolo—Whether refundable or not by heir after death of recipient. Interpretation of section 116 *of the Code of Native Law* (*Proclamation No.* 168 *of* 1932).

Held: That section 116 must be strictly interpreted, as the provisions are opposed to ancient Native Law and Custom, under which an heir was liable for all debts owed by his late father, irrespective of the value of the assets inherited.

Held: That an heir does not succeed to females as property, but he succeeds to the *guardianship* of the females and, in accordance with Native Law and Custom, the guardian is entitled to the lobolo rights of his ward, and that it stands to reason that if he is entitled to the lobolo of a girl, he must also be liable to liquidate any debts incurred regarding lobolo questions concerning that girl.

Appeal from the Court of the Native Commissioner, Greytown.

Steenkamp (President), delivering the judgment of the Court:—

Plaintiff (now appellant) sued the defendant (now respondent) for £42. 1s. being refund of lobolo he had paid to defendant's late father, Gadupi, in respect of defendant's sister, Nani. In the claim is also included an amount of £7. 1s., being money lent to the defendant personally.

The Native Commissioner entered judgment in favour of plaintiff for £8. 1s. being £1 towards the amount of lobolo which became returnable, and £7. 1s., the loan.

An appeal has been noted to this Court on the following grounds:—

(1) The evidence established that appellant became engaged to respondent's sister, Nani Mkize, in or about the year 1944, and paid to respondent's late father, Gadupi Mkize, cash and cattle representing "sibizo" fees and lobolo in respect of this contemplated union.

(2) That the respondent is the general heir of the said Gadupi Mkize, who died during the subsistence of the said engagement.

(3) That appellant's cause of action for recovery of the amounts so paid arose only after the death of the said Gadupi Mkize, at the time of the breaking-off of the said engagement.

(4) That respondent received fourteen head of lobolo cattle from the present husband of the said Nani Mkize.

(5) That in the circumstances of the present case the Native Commissioner erred in disallowing the major portion of appellant's claim on the grounds that appellant failed to establish that respondent had succeeded to sufficient assets in the Estate of his late father to cover appellant's full claim.

From the record it appears that various amounts were paid during the engagement period. The marriage did not take place, and therfore the lobola cattle became refundable, less two head of cattle, being the Ngqutu beast and the Mvimba beast, which plaintiff had to pay in respect of the seduction and pregnancy of Nani.

At the time the engagement was broken off, Gadupi was dead and since then defendant received fourteen head of cattle as lobolo for Nani from the man to whom she is now married.

The Native Commissioner in his reasons for judgment states that the only question to be decided is whether the defendant is protected by section 116 of the Code. He came to the conclusion that the whole amount of £42. 1s. was owing to the plaintiff, after certain deductions had been made, but that defendant was protected by section 116 of the Code, and therefore not liable for the amount in excess of £8. 1s. for which he gave judgment in favour of plaintiff.

The balance is therefore £34, and this Court has to decide whether a lobolo debt of this nature passes to the heir who benefits by his sister's re-marriage.

Counsel for appellant (plaintiff) in a very able argument has stressed that section 116 of the Code does not apply to lobolo transactions.

Section 116 must be strictly interpreted, as the provisions are opposed to ancient Native Law and Custom, under which an heir was liable for all debts owed by his late father, irrespective of the value of assets inherited.

The opening words of this section are—"an heir succeeding to property". The emphasis is on the word "property", and according to section 146 (1), Native females are not property. [See also Masuku *v.* Masuku, 1945, N.A.C. (T. & N.) 41.] An heir therefore does not succeed to females as property, but he succeeds to the *guardianship* of the females and in accordance with the principles of Native Law and Custom, a guardian is entitled to the lobolo rights of his ward. It stands to reason that if he is entitled to the lobolo of a girl, he must also be liable to liquidate any debts incurred regarding lobolo questions concerned with that girl. I therefore arrive at the conclusion that section 116 does not apply to an action of this nature.

I hold that the appeal should be allowed with costs and the Native Commissioner's judgment altered to read:—

"For plaintiff for £42. 1s. and costs."

O'Connell (Member):

I concur.

van Schalkwyk (Member):

I regret that I am unable to agree. None of the payments made by the appellant to respondent's late father cannot be termed "lobolo" until the celebration of the Union, the cattle being "Sisa" cattle. Both the original cattle and all the increase can be reclaimed as well as other payments made. The cash payments made cannot be regarded as anything else but deposits or advances, and held by respondent's late father in trust until the celebration of the Union, upon which day ownership of both cattle and cash would have passed to the latter. (See Stafford, at page 95.)

Section 116 of the Code provides that "an heir succeeding to property . . . becomes liable for debts in respect thereof only to the extent of the assets to which he succeeds;" and according to section 146 (1) Native females are not to be deemed or treated in any way as property or chattels, notwithstanding any property rights which may be connected with or arise out of customary unions entered into by them". An heir, therefore, does not succeed to females as property and any property rights which may be connected with or in future arise out of customary

unions entered into by them cannot be regarded as an asset [see also Masuku *v.* Masuku, 1945, N.A.C. (T. & N.), at page 41].

In the case of Dhlamini *v.* Zwane, 1947, N.A.C. (T. & N.), page 10, the Court applied section 116 in a case where there was a claim for refund of "lobolo" moneys advanced in respect of a girl who jilted plaintiff.

There is nothing in the wording of section 116 nor can I find any previous decision to indicate that the section does not apply to an action of this nature. I hold that the appeal should be dismissed with costs and the Native Commissioner's judgment confirmed.

Steenkamp (President): Delivering the judgment of the majority of the Court:—

I have considered the case of Dhlamini *v.* Zwane, 1947, N.A.C. (T. & N.) 10, from which it may seem that an heir is not liable for the return of lobolo cattle received by his father unless he has inherited property in excess of the debt. In that case the issue was confined to the question whether the defendant had in fact inherited property from his father.

The present case is therefore distinguishable as we are now called upon to give a crisp decision on the interpretation of section 116 of the Code as to whether the heir is liable to refund the lobolo irrespective of whether he inherited property from his father or not.

It is ordered that the appeal be and is hereby allowed with costs and the Native Commissioner's judgment is altered to read:—

"For plaintiff for £42. 1s. and costs."

For Appellant: Mr. A. C. Bestall of Messrs. Bestall & Uys, Kranskop.

For Respondent: No appearance.

Statutes, etc., referred to:—

Sections Nos. 116 and 146 (1) of Proclamation No. 168 of 1932.

Decided cases:—

Masuku *v.* Masuku, 1945, N.A.C. (T. & N.) 41.

Dhlamini *v.* Zwane, 1947, N.A.C. (T. & N.) 10.

CASE No. 52 OF 1950.

ROBERT DUBE (Appellant) *v.* WILLIAM D. DUBE (Respondent).

(N.A.C. CASE No. 86/50.)

VRYHEID: Wednesday, 4th October, 1950. Before Steenkamp, President. Oftebro and Craig, Members of the Court (North-Eastern Division).

Law of Procedure—Native Appeal Courts—Filing of applications —Section 19, *Government Notice No.* 2254 *of* 1928—*Notices under Government Notice No.* 1664 *of* 1929—*Reasonable time to be allowed.*

Held: That in terms of rule 19 of Government Notice No. 2254 of 1928 applications should be filed at least one clear day prior to the commencemnt of the session of the Native Appeal Court, and that, where this has not been done, the objection cannot be entertained.

Held: That enquiries under Government Notice No. 1664 of 1929 are not civil cases in Native Commissioners' Courts, but administrative enquiries, and only reasonable notice will be required.

Held: That as applicant only lived 23 miles from the Native Commissioner's office, the period between the 8th and 16th of the month, gave him ample time to attend.

Appeal from the Court of the Native Commissioner, Dundee.

Steenkamp (President), delivering the judgment of the Court:—

The late Ndhlelo Dube died many years ago, about 1879. He had a share in the farm Boschhoek in the Dundee District, and the Native Commissioner was called upon to decide who should succeed to Ndhlelo's share.

When the enquiry in terms of section 3 of Government Notice No. 1664 of 1929 was commenced, one William Dingindawo Dube and Simon Dube as interested parties appeared. Simon claimed the heirship on behalf of Robert Dube, a nephew, whereas William claimed that he was the direct descendant of Ndhlelo. The Native Commissioner postponed the enquiry on the 19th July, 1946, to enable Robert Dube to be present. Robert was away teaching in Swaziland and it was not until the 16th January, 1948, that the enquiry was resumed. On the 8th January, 1948, a notice was served on Robert personally by the Messenger of the Court calling on him to attend the enquiry. He was in default and the Native Commissioner thereafter proceeded with the enquiry and after evidence had been adduced, he found that William was the heir.

More than 2½ years later, i.e. on the 19th August, 1950, Robert caused an appeal to be lodged against the Native Commissioner's judgment. At the same time he made application for the condonation of the late noting of the appeal. This application is supported by affidavits which are to the effect that William is not the son of the late Ndhlelo, and that Ndhlelo was never married, and that he died at the battle of Majuba (1881). It is also averred by Robert that no notice was ever served on him by the Messenger of the Court, and in any case, if a notice had been served, it did not give him sufficient time to attend the enquiry.

Before application for condonation was argued, Counsel for respondent contended that the affidavits were only served on him recently and there was not sufficient time to file answering affidavits and he strongly argued that the application should be postponed. Counsel's attention was drawn to rule 19 of the Native Appeal Court Rules whereby it is provided that the application should have been filed at least one clear day prior to the commencement of the session, and as this has not been done, the objection cannot be entertained.

This Court is of opinion that as the notice served on Robert gave him sufficient time to attend the enquiry, he cannot be heard when he states that he was entitled to at least ten days notice in terms of the Native Commissioners' Court Rules. This was not a civil case but an enquiry, and no rules exist as to how enquiries should be conducted by a Native Commissioner in his administrative capacity. This Court will, however, consider whether reasonable notice had been given. Applicant only lived 23 miles from the Native Commissioner's office and the period between the 8th and the 16th January gave him ample time to attend.

The allegation that he was never served with a notice is too fantastic to consider. There is the mode of service by the Messenger of the Court, and this Court is not prepared, on a mere affidavit of the applicant, to hold that he had not been served with a notice. It seems to us that Simon is the power behind Robert, and it was only when William took steps to have Simon ejected from the farm, that an attempt is being made to re-open the proceedings.

In the present case of Ramokane Mangwane *v.* Executor Estate late Sixpence Mangwane, heard on appeal at Pretoria on the 13th September, 1950 (N.A.C. Case No. 58/50), in which application was made to remit the enquiry to the Native Commissioner for further evidence, this Court quoted the case of Colman *v.* Dunbar, 1933, A.D. 141, wherein it was held that to allow fresh evidence to be called after a case had been tried, would open the door to fraud and would offer a strong temptation to perjury.

We have carefully considered the applicant's affidavit and those of other people and we are of opinion that the statements tendered do not satisfy the tests laid down in Colman's case. We also hold that the applicant was in wilful default and as it is in the public interest that there should be finality to litigation, we are not prepared to grant the application which is hereby dismissed with costs.

For Appellant: Mr. Myburgh of Messrs. Bennett & Myburgh, Vryheid.

For Respondent: Mr. Turton, i/b Messrs. Wynne & Wynne, Dundee.

Statutes, etc., referred to:—

Section 19, Government Notice No. 2254 of 1928.
Section 3, Government Notice No. 1664 of 1929.

Cases referred to:—

Colman *v.* Dunbar, 1933, A.D. 141.

Ramokane Mangwane *v.* Executor Estate late Sixpence Mangwane, N.A.C. (N.E.D.), heard at Pretoria on 13/9/1950.

CASE No. 53 OF 1950.

DWANI DHLAMINI (Appellant) *v.* MTSHWEKI DHLAMINI (Respondent).

(N.A.C. CASE No. 62/50.)

PIETERMARITZBURG: Monday, 16th October, 1950. Before: Steenkamp, President. Lawrence and Malcomson, Members of the Court (North-Eastern Division).

Practice and Procedure—Appeal—Point taken on appeal for first time—Guardian bringing action in own name.

Held: That plea of *non locus standi in judicio* cannot be taken for first time on appeal.

Held: That, according to Native Law and Custom, a mental patient's eldest brother or his eldest son, if any, steps into his shoes and is entitled to maintain an action on behalf of the insane person.

Held: That one should not depart from well-established Native Custom.

Appeal from the Court of the Native Commissioner, Ixopo.

Steenkamp (President), delivering the judgment of the Court:—

The plaintiff, now respondent, sued the defendant, now appellant, in the Chief's Court for four head of cattle, the property of his insane uncle, which were left in the custody of defendant.

Defendant's reply to the claim was a denial that the cattle are the property of plaintiff's uncle. The Chief entered judgment in favour of plaintiff for four head of cattle with costs, and on

appeal to the Native Commissioner this judgment was confirmed. An appeal has now been noted to this Court on the following grounds:—

(1) The plaintiff had *no locus standi in judicio* as he purported to act in his capacity of prospective heir to Folo's estate, it being admitted that the said Folo is still alive.

(2) In any event plaintiff brought the action in his own name, and further there is no proof that he has been appointed *curator ad litem* to the said, Folo Dhlamini.

Alternatively: The judgment is against the weight of evidence in that plaintiff has failed to discharge the onus of proving that the cattle in dispute belong to Folo Dhlamini.

In the Native Commissioner's Court both the plaintiff and defendant were legally represented and at no time were the points mentioned in paragraphs (1) and (2) of the notice of appeal, taken.

Plaintiff in his evidence states that his uncle, Folo, who is in a mental hospital, had a daughter who married Lawrence Mkize, and lobolo was paid to plaintiff's father, who became the head over Folo's kraal when the latter was placed in the mental institution.

Plaintiff's father and the defendant lived at the same kraal, but plaintiff's father was the head, being the eldest son. It should be mentioned that defendant was the fifth son of the late father.

The Native Commissioner has found as proved that the four head of cattle in dispute are the progeny of one of the cattle paid as lobolo for Folo's daughter. The evidence is so overwhelming that this Court agrees with this finding of the Native Commissioner.

In so far as plaintiff's capacity to sue is concerned we wish to state that this point, not having been taken in the Court below, it does seem that defendant is now debarred from raising it. Assuming for the moment that the point could have been taken as a plea in bar, we hold the view that according to Native Law and Custom a mental patient's eldest brother or his eldest son, if any, steps into his shoes and is entitled to maintain an action on behalf of the insane person. Whether he could sue in his own name or whether he should first apply to the Court for the appointment of a *curator ad litem* to sue, would appear to be a risk taken by a plaintiff who sues personally and if he does so, he might be ordered to pay the costs out of his own pocket if the claim is unsuccessful.

According to section 45 of the Code it is provided that when the natural guardian of a minor is incapacitated by insanity for a period in excess of a year, the guardianship of such minor shall devolve upon the head of the kraal to which such minor belongs.

In this case Folo's daughter was a minor and her guardian, Folo, being her father, was her natural guardian, but when he became insane she then fell under the guardianship of her father's heir, who, in this case was the plaintiff's father.

There is evidence on record that plaintiff's father negotiated the marriage of Folo's daughter and received the dowry. The dowry was in his possession at the time of his death and therefore his son was entitled to inherit all the property found at his father's kraal, unless a better claim is laid to the property in question.

According to Seymour's "Native Law and Custom", page 75, the heir of a kraalhead during the latter's absence, takes charge of the family and conducts his legal proceedings.

We have consulted the case of Mdontsa *v.* Fumbalele, 1946, N.A.C. (C.O.), 68, where on page 69 the sister Court laid down certain practice which should be followed when a person sues

on behalf of an absent kraalhead. The Court made it clear that its observations are made on the understanding that they do not purport to be exhaustive and that it may become necessary to modify them. In that case it was mentioned that the representative must sue in the name of the absentee. It was also mentioned that in the case in which the representative is a minor it would be necessary to appoint a *curator ad litem*.

This is a tendency to import into the Native Law and Custom our Common Law procedure and while the remarks of the President in that case commend themselves as a procedure to be followed, we do not think that in a case under Native Law and Custom one should depart from well-established Native Custom which I am satisfied is to the effect that when a person becomes insane, all his affairs fall to be administered by the person who would have been his heir if he had died.

There is another aspect in this case that needs serious consideration and that is that the property in dispute was found at the kraal where plaintiff's father was residing and although defendant was residing at the same kraal, there is sufficient evidence to indicate that the four head of cattle were in the possession of plaintiff's father, and plaintiff being the heir, is therefore entitled to have their possession.

It appears that defendant, who is the eldest surviving brother of Folo, is under the impression that he should take precedence over his nephew, the plaintiff, who is defendant's eldest brother's eldest son, and we think it is for this reason that he claims to be entitled to the possession of the cattle. He, however, uses a subterfuge that the cattle in question are the progeny of a beast he had bought from a man by the name of Boyi Dhlamini, but as mentioned above, this evidence was discarded as not being true.

In conclusion we wish to state that the appeal has not been noted by the attorney who represented the defendant in the Court below. The points raised in grounds (1) and (2) are of a technical nature and have caused no prejudice to the defendant.

The appeal is dismissed with costs.

For Appellant: Adv. J. H. Niehaus, i/b. Messrs. Raulstone & Co., Pietermaritzburg.

For Respondent: Adv. J. D. Stalker, i/b. H. L. Bulcock, Esq., Ixopo.

Statutes, etc., referred to:—

Natal Code of Native Law.
Proclamation No. 132 of 1932, section 45.

Decided cases criticised:—

Mdontsa *v.* Fumbalele, 1946, N.A.C. (C.O.), 68.

CASE No. 54 OF 1950.

NKWAYINKWAYI NGUBANE (Appellant) *v.* **MHOSHANE NGUBANE (Respondent).**

(N.A.C. CASE No. 76/50.)

PIETERMARITZBURG: Tuesday, 17th October, 1950. Before Steenkamp, Lawrence and Malcomson, Members of the Court, (North-Eastern Division).

Law of Arbitration—Statutory—Proclamation No. 123 of 1931.

Held: That where there is a dispute in respect of the occupation of land, situated in an area to which Proclamation No. 123 of 1931 applies, the provisions of Regulation 3 (3) must be

followed, i.e. the dispute must be submitted to the arbitration of the Chief or Headman, with the right of appeal to the Native Commissioner and thereafter, if need be, to the Chief Native Commissioner, whose decision shall be final.

Appeal from the Court of the Native Commissioner, Pietermartizburg.

Lawrence, Member (delivering the judgment of the Court):—

In this case the plaintiff (appellant) sued the defendant (respondent) in the Native Commissioner's Court for the District of Pietermaritzburg for £25 as damages for the alleged wrongful disposal by the defendant of the bark and trees of a black wattle plantation, in the Inandi Location, stated to belong to plaintiff. Plaintiff also applied for an order interdicting the defendant from "trespassing, cutting down or removing any further wood or bark from plaintiff's black wattle plantation".

The defendant pleaded that he was the lawful owner of the plantation and as such entitled to deal with it as he pleases.

After a fair amount of evidence directed to show that the land on which the plantation in dispute is situated, was allotted by the then reigning Chief or Induna to each of the parties and after an inspection *in loco* (the result of which, incidentally, was not set out in the record as it should have been), the Acting Additional Native Commissioner found himself unable to decide between the two conflicting versions and gave a judgment of absolution from the instance.

An appeal is now brought to this Court by the plaintiff on the ground, in effect, that the Native Commissioner should have found on the evidence that the plaintiff had established his claim to the plantation in question and granted judgment in his favour as prayed.

This Court intimated to Counsel for the parties at the outset that it desired to hear argument on the question whether the plaintiff had not missed his remedy by instituting action in the Native Commissioner's Court instead of proceeding in terms of Regulation 3 (3) of Proclamation No. 123 of 1931, as amended by Proclamation No. 234 of 1938. This proclamation is entitled "Regulations for the Administration of Native Locations and Reserves in the Natal Province". Regulation 3 (3) provides:—

> "A chief or headman shall have power to investigate and settle, administratively, disputes in connection with the occupation of allotments as well as disputes between Native and Native in connection with grazing areas or rights of way within the area of his jurisdiction, provided that the party or parties concerned shall have the right of appeal to the Native Commissioner and thereafter, if need be, to the Chief Native Commissioner, whose decision shall be final."

Counsel for appellant argued that this Regulation does not oust the jurisdiction of the ordinary Courts. He submitted that in any case the matter had been brought before the Chief who had declined to give a decision and had referred the parties to the Native Commissioner.

Counsel for respondent agreed with the view that this being a land dispute, the procedure laid down in Proclamation No. 123 of 1931 should have been followed.

The first point to be considered is whether this is a "dispute in connection with the occupation of allotments" in terms of the Regulation quoted. Although the actual subject matter in dispute is the use and benefit of a particular wattle plantation, there is no doubt from the evidence that each party lays claim to the plantation on the ground that the land on which it stands was lawfully allotted to him. Furthermore, it was decided in this Court in the case of Papu Mdunge *v.* Monziweni Mdunge, 1947 (Natal and Transvaal), Vol. 19 (Part II), at page 48, in which a

wattle plantation was also in dispute, that trees are immovable property and inseparable from the land as long as they remain uncut.

It is therefore clear that this is a dispute in respect of the occupation of land. That being so and there being no doubt that the land in question is situated in an area to which Proclamation No. 123 of 1931 applies, it only remains to reaffirm two recent decisions of this Court, viz.: Mzamo Mahlobo *v.* Tezana Mahlobo, N.A.C. (T. & N.), 1947, 19 and Papu Mdunge *v.* Monziweni Mdunge (supra) that the provisions of Regulation 3 (3) must be followed in these cases, i.e. the dispute must be submitted to the arbitration of the Chief or Headman with a right of appeal to the Native Commissioner and thereafter, if need be, to the Chief Native Commissioner.

It may be pointed out that the necessity for these disputes to be settled by administrative enquiry rather than by legal action is indicated by the futility of the present proceedings in which the Native Commissioner, after a protracted hearing, found himself unable to come to a definite conclusion and *a fortiori* this Court, not having heard the witnesses or viewed the site, is still less in a position to give a finding which will with certainty award the land to the right party however correct its decision may be on the record before it. In such matters enquiries on the spot, unfettered by strict rules of eveidence, are more likely to bring the truth to light than the formality of Court procedure which is very often confusing to raw Natives.

We hold that the proceedings were irregular *ab initio* as it was not competent for the Native Commissioner to try the action until the land dispute had been settled in accordance with the Regulations.

The proceedings as a whole are set aside, and there will be no order as to costs.

For Appellant: Adv. J. Hershensohnn, of Pietermaritzburg.

For Respondent: Adv. D. L. Shearer, i/b Messrs. Randles & Davis, Pietermartizburg.

Statutes, etc., referred to:—

Proclamation No. 123 of 1931, section 3 (3), as amended by Proclamation No. 234 of 1938.

Decided cases referred to:—

Papu Mdunge *v.* Monziweni Mdunge, 1947, N.A.C. (T. & N.) 48.

Mzamo Mahlobo *v.* Tezana Mahlobo, 1947, N.A.C. (T. & N.) 19.

CASE No. 55 OF 1950.

REGINA MOLEFE (duly assisted) AND ANOTHER (Appellants) *v.* MAGNUS MADONDA (Respondent).

(N.A.C. CASE No. 73/50.)

PIETERMARITZBURG: Tuesday, 17th October, 1950. Before Steenkamp, President. Lawrence and Malcomson, Members of the Court (North-Eastern Division).

Donations—Military allotments—Parties acting in collusion to defraud State—Maxim in pari delicto *applied.*

Held: That where parties acted in collusion to obtain extra, undue benefits from the State, they are defrauding the Government and *in pari delicto potior est condictio defendentis* and that the money cannot then be reclaimed by one of them.

Appeal from the Court of the Native Commissioner, Himeville.

Steenkamp (President), delivering the judgment of the Court:—

The plaintiff (now respondent) sued defendant No. 1—his sister—duly assisted by her husband, and Phinias Molefe, her husband, as second defendant (now appellants), firstly for £74. 9s. 7d. which he alleges is due to him out of an amount of £120. 9s. 7d. paid to defendant No. 1 as dependant's allowance during the time he was on military service from the 23rd October, 1942, until the 21st September, 1945, less an amount of £46 which she has paid him after his return from active service; secondly for £10, being the value of a suit he had left with first defendant and which she gave to her son to wear.

The first defendant in her plea states that the money was paid to her in her personal capacity and not as agent of the plaintiff and that she is therefore not responsible to account to him therefor. She also denies that she gave the suit to her son and that its value is £10.

Second defendant's plea is to the effect that he derived no benefits from the moneys and that he cannot be held liable.

After hearing evidence the Native Commissioner gave judgment in favour of plaintiff for £84. 9s. 7d. with costs. Against this judgment an appeal has been noted in so far as the judgment refers to the military allotments paid to the first defendant, upon the following grounds:—

(1) The Native Commissioner has misdirected himself on two points:—

(*a*) As to the nature and incidence of the disposition which was a military allotment to the first defendant and as such was paid to her in her personal capacity and not as the agent of the plaintiff.

(*b*) As to the onus of proof because as plaintiff contends that the allotment is something other than a personal allotment to the first defendant then the onus was upon the plaintiff to prove this, and he failed to discharge that onus.

(2) Defendant never pleaded that the money paid to her by the Government was a donation to her by plaintiff or that she contracted with plaintiff to refund same to him and the Native Commissioner was wrong in dealing with the matter on that basis.

(3) If the parties were acting in collusion in order to defraud the Government (which is what the plaintiff contends but which is denied by the defendants), then the parties were *in pari delicto* and as between themselves the maxim *in pari delicto potior est condictio defendentis* applies.

(4) Of the money received by the first defendant only £37. 17s. 6d. was actually contributed from plaintiff's pay and as he admits receipt of £46 from first defendant he has no claim for the balance as plaintiff did not qualify nor indeed could he personally qualify for the extra 9d. per diem paid by the Government or the cost of living allowance paid to the first defendant, and the judgment is accordingly wrong on its merits.

For the purpose of the judgment of this Court we are prepared to accept the plaintiff's evidence which is to the effect that before he enlisted on military service he arranged with his sister (first defendant) to make an allotment to her. Before dealing with this question it is desired to state that a recruit was entitled to basic pay of 1s. 6d. per day out of which he could draw 9d. per day at the end of each and every month, but the balance of 9d. per day was on the deferred pay system—that means that he was entitled to a lump sum equivalent to 9d. per day on discharge from military service. If, however, he had any dependants, he was

allowed to allot half his pay to the dependant and the military authorities also contributed 9d. per day towards the maintenance of the dependants, making a total of 2s. 3d. per day. The dependants were also entitled to cost of living allowance, to which the soldier was not entitled, as he was receiving rations and quarters while on military service.

It is clear from the record that the reason the plaintiff allotted 9d. of his pay to the defendant was to qualify himself for the higher rate of pay. The question now arises whether a soldier may, as a subterfuge, make an allotment to a sister, who is not dependant on him, with the sole object of deriving a benefit to which he is not entitled. Such a practice can only be interpreted to mean that the plaintiff deliberately made an attempt, and did succeed in getting the State to pay out, in connection with this individual soldier, a higher amount than what would have been the case otherwise. It is observed that when plaintiff was attested at Durban on the 23rd September, 1942, he mentioned as a dependent the name of first defendant. She subsequently accepted the money paid out to her by the Native Commissioner at Himeville and therefore she was a party to the receipt of moneys to which she was not entitled.

These two acted in collusion to obtain extra undue benefits from the State and, this being the case, are *in pari delicto* in defrauding the Government, and plaintiff cannot therefore reclaim the moneys paid out to defendant No. 1.

It is true defendant No. 1 also recived 9d. a day which plaintiff would have been entitled to if he had not made the allotment. Plaintiff was on military service for a period of 1,065 days and this at 9d. a day comes to an amount of £38. 18s. 9d., i.e. £1. 1s. 3d. more than that alleged in Ground 4 of the notice of appeal. It is admitted by plaintiff that after he returned from military service his sister accounted to him for £46, and therefore she has in fact refunded to him an amount in excess of that to which he was originally entitled, if no allotment had been made.

Counsel for respondent has argued that nowhere in their plea did the defendants aver that they or the plaintiff acted in collusion to defraud the State when the allotment was paid to defendant No. 1, and therefore it cannot be raised on appeal for the first time. This Court cannot agree with that contention, as illegality or fraud may even be raised *mero motu* by the Court below or by this Court.

It is our opinion that the grounds of appeal are sound and the defendants must succeed. There is no appeal against the award of £10 for the suit of clothes.

It is ordered that the appeal be and is hereby allowed with costs and the Native Commissioner's judgment is altered to read as follows:—

"Claim No. 1: For Defendants with costs.

Claim No. 2: For Plaintiff for £10 and costs."

For Appellant: Adv. J. D. Stalker, i/b. Mr. H. L. Bulcock, of Ixopo.

For Respondent: Mr. G. S. Clulow, of Ixopo.

CASE No. 56 OF 1950.

NOTSHEVU SOSIBA AND OTHERS (Appellants) v. BAMBINGUBO MADUNA (Respondent).

(N.A.C. Case No. 79/50.)

PIETERMARITZBURG: Wednesday, 18th October, 1950. Before Steenkamp, President, Lawrence and Malcomson, Members of the Court (North-Eastern Division).

Law of Delicts—Assault—Quantum of damages—Provocation.

Held: That, although the assailants were provoked, it was not necessary for all twelve of them to have set on the plaintiff, an older man, and belabour him with so many blows that he had to be taken to hospital, where he regained consciousness for the first time after the assault.

Appeal from the Court of the Native Commissioner, Weenen.

Steenkamp (President), delivering the judgment of the Court:—

In the Native Commissioner's Court the plaintiff, now respondent, claimed from the defendants, now appellants, the sum of £300 as damages for an unprovoked assault committed upon him by defendants Nos. 1 to 12 on the 26th December, 1949. Defendants Nos. 13 to 19 are joined in their capacity as kraal heads.

In their plea the defendants denied that they or any one of them assaulted the plaintiff. The defendants Nos. 13 to 19 denied liability. There is an alternative plea by all the defendants which is to the effect that plaintiff is not entitled to any damages in view of the fact that he consented to run the risk of injury by taking part in a fight of his own free will.

After hearing evidence the Native Commissioner awarded the plaintiff against all defendants jointly and severally, the one paying the others to be absolved, an amount of £60 with costs. An appeal has been noted against this judgment on the following grounds:—

(1) That the Native Commissioner should have found that the plaintiff was himself the cause of the trouble and that he voluntarily took part in a faction fight and consequently cannot recover any damages in respect of injuries received in the course of such faction fight.

(2) That the plaintiff was unable to establish who the parties were who caused the injuries suffered.

(3) That the Native Commissioner should have rejected the explanation of the injuries suffered by plaintiff given by certain defence witnesses who state that he had fallen over a " donga " while in the state of intoxication.

(4) That in any event the damages awarded were excessive.

The Native Commissioner in his reasons for judgment states that plaintiff in giving evidence was not as impressive as his witness and the defence witnesses. The Native Commissioner puts this down to the effect of the injuries plaintiff had sustained in the assault. He has commented favourably on the evidence given by defendant No. 13 and he states that the evidence of this defendant bears out to a large degree the evidence of plaintiff's witness, Mavimbela. He goes on and states that he has no hesitation in saying that he believes that plaintiff, by his words, did provoke the men who assaulted him. He also states that even though it is accepted that plaintiff did provoke defendants Nos. 1 to 12, it does not justify the assault on the plaintiff. These

remarks by the Native Commissioner are fully borne out by the evidence which is to the effect that some trouble arose at the beer drink held at the kraal of defendant No. 13. Defendant No. 13 did his best to prevent a fight and actually ordered the people at the kraal to leave. Plaintiff is alleged to have remarked to the men belonging to his section: "Do not be afraid to-day because we are with you", and we are of opinion that if plaintiff had only kept quiet after defendant No. 13 had ordered the visitors to leave, there would probably have been no fight. Plaintiff provoked a fight but the question still remains whether defendants Nos. 1 to 12 were justified in assaulting him the way they did. He received many injuries which necesistated him being admitted to hospital. It is remarkable that not one of the defendants or anybody else could show any marks or healed wounds, and therefore there can be no doubt that this was an assault and not a fight. Grounds 1, 2 and 3 of the notice of appeal cannot be entertained. Ground 4 is against the quantum of damages awarded.

It has been repeatedly laid down that where a person provokes an assault on himself, the Courts will not award heavy damages. The Native Commisioner, in the light of his finding that plaintiff provoked the assault, saw fit to award £60 damages against all the defendants, and this Court has to decide whether this amount is grossly excessive.

There were twelve assailants and the plaintiff was an older man, and although plaintiff provoked them, it was not necessary for all twelve to have set on to him and belaboured him with so many blows that he had to be taken to hospital, where he regained consciousness for the first time after the assault.

We are not prepared to interfere with the Native Commissioner's award.

The appeal is dismissed with costs.

For Appellant: Adv. N. James, instructed by A. M. Buchan, Esq., Weenen.

For Respondent: Mr. Van Rooyen, of Messrs. Van Rooyen & Forder, Greytown.

CASE No. 57 OF 1950.

TSHAYINKUKU BIYELA (Appellant) *v.* NGUQU NXUMALO (Respondent).

(N.A.C. Case No. 82/50.)

ESHOWE: Tuesday, 24th October, 1950. Before Steenkamp, President, Israel and Hobson, Members of the Court (North-Eastern Division).

Practice and Procedure—Appeals from Chief's Courts—Native Commissioner not to use the words "Appellant" and "Respondent", but "Plaintiff" and "Defendant".

Held: That in no circumstances should Native Commissioners use the words "Appellant" and "Respondent" when an appeal is heard from a Chief's Court, as this only leads to confusion when an appeal is brought before this Court.

Appeal from the Court of the Native Commissioner, Melmoth.

Steenkamp (President), delivering the judgment of the Court:—

In the Chief's Court the plaintiff (now appellant) sued the defendant (now respondent) for the return of his wife Katazile with the children and eight head of cattle. In his claim plaintiff

avers that his wife left his kraal and took the cattle with her. Defendant is not Katazile's guardian or protector.

In his reply in the Chief's Court the defendant admits the claim in so far as plaintiff's wife and children are concerned, but claims that the eight head of cattle are his property. He counterclaimed for a further seven head of cattle. The Chief gave judgment for plaintiff as claimed with costs, but on appeal to the Native Commissioner the appeal was allowed and the Chief's judgment was set aside with costs.

Plaintiff has now lodged an appeal to this Court. Before dealing with the facts of the case it is desired to point out that although there was a counterclaim in the Chief's Court, this was apparently not dealt with, nor has the Native Commissioner seen fit to adjudicate thereon. The omissions are not explained, and this Court cannot let these pass without comment. It became the duty of the Native Commissioner to have given a decision on the counterclaim, but as he has not done so, it is not necessary to pursue it any further.

The Native Commissioner's judgment on the main claim is not a proper one. After allowing the appeal he should have stated whether he altered the Chief's judgment to one for defendant or whether he was giving an absolution judgment. The way we read the Native Commissioner's judgment it simply means that no judgment had been given and either party on the same record may apply for a definite judgment and may, before doing so, apply for leave to adduce further evidence. This Court will, however, rectify the ommission.

In not applying his mind to such an important aspect of the case this Court gains the impression that the Acting Native Commissioner, in trying the case, likewise did not give proper consideration to the various important features arising out of the evidence.

This Court is constrained to reiterate remarks made in other cases as to how the various parties should be named when an appeal is heard from the Chief's Court. In Zulu *v.* Qwabe, 1943, N.A.C. (T. & N.) 89, it was pointed out that a Native Commissioner should, in hearing an appeal from a Chief, retain the same appellation. In the later case of Dhlamini *v.* Sibisi, 1947, N.A.C. (T. & N.) 13, it was pointed out that Native Commissioners, in trying cases on appeal from a Chief's Court, should make use of the words " Plaintiff " and " Defendant ". In no circumstances should they use the words " Appellant " and " Respondent " as this only leads to confusion when an appeal is brought before this Court.

In the present case I have had to alter my copy of the record by substituting " Plaintiff " or " Defendant " for the words " Respondent " or " Appellant " as I became unduly confused in trying to fathom out who was plaintiff and who was defendant.

It is necesary to ascertain from the record the history of three head of cattle. Plaintiff alleges that when he married his wife Katazile, he received an " mbeka " beast and an " isigodo " beast and one beast which his wife had earned before her marriage.

There is no dispute that the " isigodo " beast was slaughtered and the Native Commissioner found proved that the progeny of the " mbeka " beast are not in issue in this case. In fact, he found proved that on the day of the wedding an announcement was made that the father of his wife was returning to him one of the cattle paid as lobolo and that he was giving his wife the " isigodo " beast.

The issue in this case is in connection with the progeny of the beast which she had earned. It is common cause that this beast was at the kraal of one Mpoli and that the beast and its progeny eventually found their way to the kraal of the plaintiff. Defendant states that the beast at Mpoli's kraal was his property and that he had sisaed the cow to plaintiff's wife as she had no milk for her children.

Katazile left her husband one night, taking with her seven head of cattle, being the progeny of the beast which came from Mpoli's kraal. It is alleged that she left the kraal because plaintiff was not supporting her. It is observed that she did not go to her protector, but went to the kraal of a younger brother, the defendant in the present case. When plaintiff discovered that his wife had left with the children, he immediately reported to her protector, but as she was not there he received information that she was at the kraal of the defendant. It is only natural to assume, and the evidence bears this out, that when he got to defendant's kraal, there must have been a dispute. He took action in the Chief's Court and the case was tried about two months afterwards. The Chief gave judgment in favour of plaintiff, but on appeal to the Native Commissioner this judgment was set aside. An appeal has now been noted to this Court.

The first point that strikes one is on whom does the onus rest to prove that the cattle, which the woman Katazile took away from her husband's kraal, are in fact the property of defendant. The Native Commissioner has decided this case as if the onus rests on the plaintiff. In fact in his reasons for judgment he states *inter alia*: " In order to have succeeded the plaintiff should have proved his ownership in the eight head of cattle in question." He also states further on: " Plaintiff failed to prove to the satisfaction of the Court his ownership in the cattle in question." Still later he states: " On the evidence I decided that the plaintiff had not established his case at all."

When we consider that the plaintiff was in possession of the cattle which his wife took away without his permission and handed them over to defendant, then we can only come to the conclusion that defendant, having accepted those cattle, must prove that he is entitled to their possession or that he is the owner.

We also have to consider what the probabilities are in the case. The Native Commissioner states: " It hardly seems likely that the woman Katazile, when she left plaintiff's kraal with the intention of terminating the marriage, would have taken some of her husband's cattle with her." It seems far more likely that she took the cattle because they were the progeny of her own earnings before she was married to the plaintiff and therefore she would be under the impression that she was entitled to remove these cattle when it was her intention to terminate the marriage. If the cattle had been sisaed, then she would not have taken the cattle to the alleged owner and would have left this part of the matter in the hands of the alleged owner.

The probabilities therefore are in favour of the plaintiff. The Native Commissioner has drawn attention to certain discrepancies in the evidence adduced by plaintiff personally, where he first of all stated that the " isigodo " beast was a female animal and later on he stated that it was a young " tollie ". It cannot be overlooked that when the plaintiff gave this evidence he—almost in the same breath—corrected the evidence first given and then stated: " it was a young tollie ". There is no dispute that it was a young " tollie " and therefore this conflicting evidence should not have unduly influenced the Native Commissioner, especially as the issue before the Court was the progeny of the alleged sisaed beast.

It was argued by Counsel for appellant that the word " tollie " means a female calf, but this Court cannot accept his contention, as it has always been accepted by the Courts and in every-day conversation that the word " tollie " means a male calf. This is borne out by " Groot Woordeboek " by Kritzinger, Steyn, Schoonees and Cronje in which the Afrikaans word " tollie " is translated as " a young ox ". The English word " tolly " is translated ibid as " jong ossie ".

This Court is loath to interfere with the judgment of a Native Commissioner based on credibility of evidence, but where the

Native Commissioner has placed the onus on the wrong party and also when he has misdirected himself as to the probabilities, then it becomes the duty of this Court to interfere with the judgment unless, notwithstanding the Native Commissioner's error, the evidence is such that it can be accepted that defendant has discharged the onus.

Plaintiff called as a witness the girl's protector who confirmed plaintiff's evidence that the original beast was given to the plaintiff, but the Native Commissioner has discarded this man's evidence altogether because the man is old and did not appear to know what he was talking about. He has accepted the evidence of the "mkongi" who was present at the wedding and who states that there was no mention made of the beast which the woman had earned. I am not prepared to accept that the "mkongi's" evidence is final. The "mkongi" was only there in connection with the lobolo and not in connection with any other matter concerning the beast which the woman had earned.

I therefore come to the conclusion that the Acting Native Commissioner has erred in allowing the appeal from the Chief's judgment. In my opinion the probabilities are in favour of the plaintiff and he is entitled to a judgment. The counterclaim was not proceeded with.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read:—

"The appeal from the Chief's Court is dismissed with costs."

For Appellant: Mr. S. H. Brien, of Messrs. Wynne & Wynne, Eshowe.

For Respondent: Mr. W. E. White, of Eshowe.

Cases referred to:—

Zulu *v.* Qwabe, 1943, N.A.C. (T. & N.) 89.

Dhlamini *v.* Sibisi, 1947, N.A.C. (T. & N.) 13.

CASE No. 58 OF 1950.

GIBSON MNDAWENI (Appellant) *v.* JANE MAVUNDHLA (Respondent).

(N.A.C. CASE No. 98/50.)

DURBAN: Monday the 30th October, 1950. Before Steenkamp, President, Ashton and Cohen, Members of the Court (North-Eastern Division).

Law of Procedure—Ejectment order in cases where there is a dispute regarding occupation.

Held: That where there is a dispute as to the right of occupation, such dispute must be settled by a competent Court before an ejectment order may be asked for.

Appeal from the Court of the Native Commissioner, Durban.

Steenkamp (President), delivering the judgment of the Court:—

The defendant, now respondent, was a registered tenant and lawful occupier of Cottage No. 1726, Road 2, Chesterville, Durban, until the end of March, 1950.

Plaintiff, now appellant, alleges that he became the registered tenant and lawful occupier of that cottage as from April, 1950. There is therefore a dispute between the parties as to who should be deemed to be the lawful occupier. It has not yet been established in a competent Court of law who the lawful

occupier is, and until this is established, this Court is not in a position definitely to lay down who the person is to be ejected from that property.

It appears from the evidence that the defendant sold some of her furniture to the plaintiff. He alleges that he only purchased the furniture because the defendant informed him that she was leaving for good, and that he could become the occupier of the property in question. She left her other furniture in the house and plaintiff, when she returned from Johannesburg, was sued by him for an order to remove the furniture from the house. She counterclaimed in an action for the ejectment of plaintiff from the cottage.

The Native Commissioner on the main claim entered a judgment which reads: "Order applied for is refused" and on the counterclaim: "Ejectment order is refused". He also made an order that plaintiff should pay costs.

An appeal has been noted by the plaintiff to this Court on the following grounds:—

(1) That the judgment is against the weight of evidence.

(2) That the Additional Native Commissioner erred in founding his decision on the fact that one Peter Thali was not called as a witness by plaintiff in the absence of any reference to such absence or the reason why such party did not give any evidence and that he allowed himself to be unduly influenced thereby to the exclusion of proper consideration of the evidence adduced.

(3) That in dismissing the defendant's counterclaim the Additional Native Commissioner erred in granting the costs against the plaintiff.

There can be no question that until such time as the right of occupation of the cottage is settled in a competent Court of law, the Native Commissioner was not in a position to give a judgment as to which of the parties should be ejected.

Counsel for appellant has argued strongly that plaintiff should not pay the costs in the Court below, but this Court cannot agree with that contention, as the defendant, now respondent, definitely stated in her evidence that she is proceeding with an action against the Superintendent of Chesterville as first respondent, the Mayor and Council of Durban as second respondent and the plaintiff in this action as third respondent, to restore possession of the house to her.

While that issue is *sub judice* it is not competent for plaintiff to bring an action in this Court and therefore any costs incurred are entirely due to the institution of a premature action by him.

Counsel has also argued that the judgment on the main claim might be interpreted to mean that a final judgment had been given, whereas in fact what was intended was an absolution judgment.

To remove any doubt, this Court, by virtue of the powers vested in it by Section 15 of the Native Administration Act, will alter the Native Commissioner's judgment.

The appeal is dismissed with costs, but the Native Commissioner's judgment on the claim in convention is altered to read:—

"Absolution from the instance with costs."

There is no appeal against the judgment in the counterclaim.

For Appellant: Mr. De Villiers of Messrs. A. Goldberg & Co., Durban.

For Respondent: Adv. A. M. Torf, instructed by Messrs. Cowly & Cowly, Durban.

CASE No. 59 OF 1950.

NJAMBILI MABASO (Appellant) *v.* SIKWAYO NDULI (KWELA) (Respondent).

(N.A.C. CASE No. 92/50.)

DURBAN: Tuesday, 31st October, 1950. Before Steenkamp, President, Ashton and Cohen, Members of the Court (North-Eastern Division).

Practice and Procedure—Application for condonation of late noting of appeal—Question of manifest injustice.

Held: That as the reasons for not having stamped the notice of appeal are not such that this Court could condone the ommission, the Court will have to go into the question as to whether, according to the record, there has been a manifest injustice, to warrant the condition of the late noting.

Appeal from the Court of the Native Commissioner, Mapumulo.

Steenkamp (President), delivering the judgment of the Court:—

The Chief granted judgment for plaintiff with costs in a claim for 10 head of cattle and 10s. which plaintiff alleges he paid to defendant as part payment for lobolo in respect of defendant's daughter who jilted plaintiff. On appeal to the Native Commissioner this judgment was set aside with costs.

The facts of the case are that defendant's niece (not his daughter), Situnywa, became engaged to plaintiff, who paid the lobolo now being claimed as a refund. She jilted the plaintiff. Situnywa's guardian is her brother, Mshokobezi, but the lobolo negotiations were undertaken by their uncle, the defendant, who now claims that he is not responsible for the refund and that plaintiff should have sued Mshokobezi.

The issue is therefore confined to the question whether Situnywa's guardian is Mshokobezi or whether defendant is her guardian. As will be seen later it is also necessary to decide whether the plaintiff knew at the time the lobolo was paid that Mshokobezi was her guardian.

Against the Native Commissioner's decision an appeal has been noted to this Court on the grounds that the judgment is against the weight of evidence and the law. The notice of appeal was not stamped as provided in the rules, and only after the Clerk of the Court had pointed this out to the Attorneys who noted the appeal, were the necessary stamps affixed. The period within which the appeal should have been noted had by then expired, and application is now made to this Court to condone the irregularity.

The reasons for not having stamped the notice of appeal are not such that this Court could condone the omission, and we will have to go into the question as to whether, according to the record, there has been a manifest injustice to warrant the condonation of the late noting.

This Court has consulted the following cases which have a bearing on the question whether the person to whom the lobolo was paid should be held responsible for the refund or whether the guardian of the girl is responsible:—

1. Mbekeni *v.* Mbejeni, 1 N.A.C. 13 (Transkei).
2. Bacala *v.* Nqwakuzayo, 1 N.A.C. 259 (Transkei).
3. Bokolo *v.* Mavune, 1 N.A.C. 109 (Transkei).
4. Tshobisa *v.* Gugushe and Ntantiso, 1 N.A.C. 139 (Transkei).

In cases 1 and 2 it was held that the guardian of the girl should be sued notwithstanding the fact that the lobolo was received

by an uncle who acted on behalf of the guardian. In the first case it is not stated whether the lobolo payer knew that the uncle was only the agent, but in the second case the payer knew this.

In cases 3 and 4 the Court came to the conclusion that the payer did not know that the person who received the lobolo only acted as agent and it was held that the plaintiff correctly sued the person to whom he paid the lobolo.

In the present case all the parties concerned in the case live in the same locality. They knew each other well and as pointed out by the Native Commissioner in his reasons for judgment it is difficult to accept that plaintiff did not know that defendant was not the girl's guardian. It must therefore be accepted that at the time the lobolo was paid by the plaintiff he knew that defendant was receiving it as agent for Mshokobezi, the girl's brother.

Apart from the four cases quoted above, we have to consider the Law of Agency.

It is stated on page 202 in the "Law of Agency in South Africa" by De Villiers and Macintosh (1933 Edition) that an agent is liable where the contract is made with him in the belief and upon the faith of his being the principal.

The cases decided by the Transkeien Native Appeal Court (quoted *supra*) are therefore in accordance with the principles of the Law of Agency and as in the present case the plaint.ff knew or must have known that defendant was only acting as agent for the girl's brother, he cannot be held liable.

On the evidence the appellant has no prospect of success and the application is therefore refused with costs.

RIDER.

The Native Commissioner's attention is drawn to the necessity for a Native Commissioner who allows an appeal from a Chief's judgment and sets aside that judgment, to substitute what he considers is a correct judgment.

For Appellant: Adv. A. M. Torf, instructed by Messrs. Cowly & Cowly, Durban.

For Respondent: Adv. B. D. Burne, instructed by Mr. A. E. Foss, of Stanger.

Decided cases referred to:—

Mbekeni *v.* Mbejeni, 1 N.A.C. 13 (Transkei).

Bacala *v.* Nqwakuzayo, 1 N.A.C. 259 (Transkei).

Bokolo *v.* Mavune, 1 N.A.C. 109 (Transkei).

Tshobisa *v.* Gugushe and Ntantiso, 1 N.A.C. 139 (Transkei).

CASE No. 60 OF 1950.

MASANYUSA MSINGA (Appellant) *v.* ALZINA SUNTSHA (duly assisted by ALBERT SUNTSHA) (Respondent).

(N.A.C. CASE No. 95/50.)

DURBAN: Tuesday, 31st October, 1950. Before Steenkamp, President. Ashton and Cohen, Members of the Court (North-Eastern Division).

Law of Contracts—Betting contracts.

Held: That, as the gambling transaction was not relied upon, money received in a game of chance on behalf of another person must be handed over to the person who is entitled to the winnings.

Appeal from the Court of the Native Commissioner, Durban.

Steenkamp (President), delivering the judgment of the Court:—

The plaintiff, a woman, duly assisted, sued the defendant in the Native Commissioner's Court, Durban, for the sum of £130. 6s. 3d. In the summons she avers that she and the defendant entered into a joint venture towards which she contributed 2s. 6d. for the purpose of placing a bet at the Race Course, Greyville, Durban, on what is commonly known as a "double". The betting ticket was taken on the totalisator by the defendant on horses numbers 1 and 19. These two horses duly won and an amount of £521. 5s. was paid out, of which plaintiff claims a quarter share.

The Native Commissioner gave judgment in favour of plaintiff for £130. 6s. 3d. with costs and against this judgment an appeal has been noted in this Court on the following grounds:—

(1) The judgment is against the weight of evidence.

(2) That the cause of action was illegal in that it was a gambling transaction and it is therfore not claimable in law.

Counsel for appellant has confined his arguments mostly to the legal aspects and here we wish to point out that in so far as the evidence is concerned, this is so overwhelmingly in favour of the respondent, that we are not prepared to differ from the Native Commissioner on the question of facts.

Counsel for appellant has quoted section *twenty-five* of the Natal Provincial Ordinance No. 17 of 1922, as amended by Ordinance No. 6 of 1923. Sub-section (2), as amended, reads as follows:—

> "No person shall act as an agent, or on behalf of, any other person in making or arranging a bet or in any matter relating to the making or arranging of a bet."

This sub-section goes on and makes it clear that the provisions just quoted also apply to a bet made on a totalisator.

Counsel for appellant has strongly argued that as the undertaking by the appellant and respondent is in the nature of an illegal act, respondent cannot recover. He has also urged that the appellant is prohibited by the provisions of the Ordinance from making a bet on behalf of respondent.

This Court cannot agree that the bet was made by the appellant on behalf of respondent. It is more correct to state that the bet was made on behalf of a *persona* comprising the appellant and respondent.

Counsel for appellant has also quoted the English case of Hyams *v.* Stuart-King, King's Bench Division, 1908 (2) in which Fletcher Moulton (L.J.) dissented. Counsel has quoted extracts from page 718 of the report but he has apparently overlooked the fact that what he has quoted are *obiter dicta* by the Judge who gave the dissenting judgment and the quotations cannot accordingly be given much weight.

The gambling transaction was not relied upon, and it is good law, as quoted on pages 22 and 23 of Maasdorp's "Institutes of South African Law", Vol. 3, 6th Edition, that money received in a game of chance on behalf of another person must be handed over to the person who is entitled to the winnings.

The appeal is dismissed with costs.

For Appellant: Adv. A. M. Torf, instructed by Mr. T. J. D'Alton, of Durban.

For Respondent: Mr. R. I. Arenstein, of Durban.

Statutes, etc. referred to:—

Ordinance No. 17 of 1922 (Natal) section *twenty-five*, as amended by Ordinance No. 6 of 1923.

Cases referred to:—

Hyams *v.* Stuart-King [K.B. 1908 (2)].

CASE No. 61 OF 1950.

T. W. THIBEDI (Appellant) *v.* J. QOLOMA AND J. G. MPONGO (Respondents).

(N.A.C. CASE No. 71/50.)

PRETORIA: Monday, 4th December, 1950. Before Steenkamp, President, Israel and O'Connell, Members of the Court (North-Eastern Division).

Law of Delicts—Defamation—Privilege—Quantum of damages.

Held: That there was personal ill-will and even enmity on the part of the defendant against the plaintiffs, and that this defeated the defence of privilege.

Appeal from the Court of the Native Commissioner, Pretoria.

Israel, Permanent Member (delivering the judgment of the Court):—

In the Native Commissioner's Court the plaintiffs, now respondents, each a minister of a separate Native religious body and men of some substance amongst the Native community of Eerste Rust, a Native Township outside Pretoria, sued defendant, now appellant, for £150 each for defamation in that he, the defendant, sent to the Native Commissioner, Pretoria, a copy of a letter which he had addressed to each of them in the following terms:—

> "Please take note and stop immediately taking monies from Eerste Rust residents under understanding that such monies is for the purpose of paying C.P.S.s or Home Guards for it is alleged that such monies never reach the hands of C.P.S.s or Home Guards, many of them has lodged complaints against your doing so, pending the coming of the Native Commissioner for fresh elections.
>
> *N.B.*—A copy of this letter is being forwarded to Native Commissioner, Church Street, Pretoria.
>
> (Signed) T. W. Thibedi.
> Secretary."

On this communication the plaintiffs place the innuendo that—

> "the plaintiffs jointly and severally are dishonest persons in that they have collected money from the Eersterus residents for the purpose of paying the C.P.S. or Home Guards, but that the plaintiffs, instead of so remunerating the C.P.S. or Home Guards with such moneys collected, have failed to do so and have converted the money to their own use and benefit."

The defence was the plea that defendant acted bona fide without malice on a privileged occasion; that he had a duty in forwarding the said letter to the Native Commissioner as guardian of Native rights and that the said Native Commissioner had a corresponding interest, as such, in receiving the said communication; and a denial that plaintiffs had been damaged in their reputation or had suffered any damage at all.

In giving judgment for the plaintiffs in the sum of £20 each, the Additional Native Commissioner found—

(*a*) that the letter was in fact defamatory and imputed dishonesty to the plaintiffs;

(*b*) that the occasion of the publication was qualifiedly privileged; and

(*c*) that malice had been proved.

Against this judgment an appeal has been noted on grounds which may be summarised as follows:—

(1) That the Native Commissioner erred in holding—

(*a*) that the statement was defamatory and bore the meaning attributed to it; and

(*b*) that there was malice.

(2) That the Additional Native Commissioner should have held—

(*a*) that the plaintiffs had failed in their duty of accounting for the money involved;

(*b*) that the defendant wrote the letter on the instructions of a committee to which he was Secretary and in his capacity as such, and was therefore not personally responsible; and

(*c*) that the occasion being priveleged, the onus of proving malice was on the plaintiffs, and had not been discharged.

As regards the contention that the Native Commissioner had wrongly held that plaintiffs had failed in their duty in accounting for the money involved, it is the opinion of this Court that that contention is not tenable, as defendant has not shown that his allegations in this regard had any foundation. All he could do was to bring various witnesses to say that they were not satisfied with the amounts that they had received—not that they had received no amounts at all, or that plaintiffs had misappropriated the moneys collected.

As far as the question of the actual character of the communication in dispute is concerned, there is no doubt in the mind of the Court that it was defamatory, for the meaning of the words used are plain and can have no other import than that placed on them by the plaintiffs. This defendant himself virtually admits when, although denying any improper intentions or motive, he said in cross-examination that—

> "it was my intention to imply that the plaintiffs were dishonest when Exhibit B was written. I was aware when writing Exhibit B that I was imputing dishonesty."

It was strongly argued by Counsel for appellant that the contents of the letter cannot mean more than that he money was used for the purpose for which it was collected. For all that is known he might have intended to convey that the moneys were still in the hands of the respondents and that they might be waiting for a suitable opportunity to pay it out. In view of Appellant's evidence that his intention was to imply dishonesty, any doubt which might have existed in this respect has been dispelled by himself.

The contention of non-liability on the part of the defendant by reason of his having acted on instructions can be similarly disposed of immediately and shortly; and he cannot escape responsibility on this ground either, for it is trite law that every person taking part in the publication of a defamatory statement, whether as instigator or as perpetrator, is liable for the injury done. (See Nathan's "Law of Defamation", page 169, and McKerron's "Law of Delict", 3rd Edition, page 213).

We come now to the crux of the case—the question of privilege and the degree of protection the document in question enjoys thereunder, and to consider this aspect it will be necessary, not only to study the letter itself, but to traverse the circumstances surrounding its publication and the history of the whole matter. Thus the evidence discloses that for many years, since in fact before 1927 at least, there had been a body in the Eerste Rust Native Township, variously named, but now called the "Eerste Rust Native Township Committee", whose main function was, as it is stated, to be the "eye of the village" to protect the interests

of the residents, and it is important to note that in fulfilling this function the Committee was held by the Native Commissioner, in whose area of jurisdiction Eerste Rust falls, generally responsible for law and order in the Township; was relied upon to report to him any matters proper for his information, and was referred to in administrative matters concerning the Township and its residents. The Committee and its officers were elected periodically by public vote, and plaintiff No. 1 is its present Chairman, and plaintiff No. 2 its present Secretary.

A few years back it took as one of its duties the formation of a sort of Home Guard organisation or Civilian Protection Service and collected money from the residents to pay the guards for their services, and it is the administration of the fund so created that is the gravamen of the charge which the defendant sought to lay against the plaintiffs.

Then in 1945—more than twenty years after this committee had first been formed—defendant appeared on the scene. This man, it is clear from the record, had decided political aspirations, and appears to have been the force behind the formation of a rival local body, namely the Eerste Rust Village Council of which he contrived to have himself appointed Secretary. There is no doubt that in doing so, defendant (and he practically admitted it in cross-examination) desired to oust the old committee and to usurp its position in the community, for which purposes, since his advent in the area, he had conducted continuous and sometimes violent propaganda aimed principally at the plaintiffs. In this it seems he did not hesitate to use whatever weapons came to his hand, and the letter in question was the last, and to him, the most potential weapon of them all.

Now the Additional Native Commissioner has found that the occasion of the statement was qualifiedly privileged in that it was made by defendant in the discharge of a duty to the Native Commissioner of the district, who had a duty to receive it, but he also found, and gave judgment in accordance with such finding, that malice had been proved.

Schreiner, J. A., in the case of Basner *v.* Trigger, 1946, A.D., at page 96, in criticising the use of the term *animus injuriandi* in connection with privilege, said:—

> "It seems preferable to say that privilege is defeated by proof of malice and by that alone."

It is for this Court therefore to investigate this question of malice in the present case, for on its existence or absence rests the protection of privilege. What is then the position? That there was personal ill-will and even enmity on the part of defendant against the plaintiffs is abundantly clear from what has gone before and from his activities as disclosed by the evidence which the Additional Native Commissioner has accepted, quite rightly in our opinion, as showing that "defendant had been working actively against the plaintiffs for years and had led the opposition to them". But this does not conclude the issue: Was the defendant, in sending the copy of the letter to the Native Commissioner, actuated by the desire to vent his ill-will against the plaintiffs? (See Midder *v.* Hamilton, 1923, T.P.D., at page 452.) The answer in the opinion of this Court is in the affirmative. The letter itself is not a complaint but a bare statement imputing to the plaintiffs' dishonesty which the evidence does not substantiate in any degree. It asks for no action on the part of the Native Commissioner and, in fact, produced none. It was sent purely for his information—obviously to poison his mind against the plaintiffs whom previously, in his own words, he had regarded as honourable men. This was precisely the effect, accordingly to his evidence, it did have on the Native Commissioner, and the whole motive of the publication is to be found in the words of the letter "pending the coming of the Native Commissioner *for a fresh election*".

This Court is satisfied therefore that malice has been proved and it is accordingly not necessary to enquire into the point which, in our opinion, is open to question—whether privilege actually existed.

As far as the measure of damages awarded is concerned, it should be noted that the plaintiffs are ministers of religion to whom their compatriots would naturally look with considerable respect. They were leaders of their community for many years and as such had the confidence of the Native Commissioner who gave them his recognition, and their reputations must have been lowered appreciably in the eyes, both of the Natives of the Township and this European official with whom they dealt. The action of defendant, moreover, was calculated and wilful. In these circumstances, therefore, the damages awarded are not so excessive that this Court is prepared to interfere therewith.

The appeal is dismissed with costs.

For Appellant: Adv. T. P. C. Boezaart, instructed by Mr. J. Janover, of Pretoria.

For Respondent: Adv. C. F. Eloff, instructed by Messrs. Edelstein & Veale, of Pretoria.

Decided cases, etc, referred to:—

Midder *v.* Hamilton, 1932, T.P.D., 452.

Basner v. Trigger, 1946, A.D., 96.

CASE No. 62 OF 1950.

BETHUEL MASHAKWE (Appellant) *v.* FRANK MASHAKWE (Respondent).

(N.A.C. Case No. 89/50.)

PRETORIA: Monday the 4th December, 1950. Before Steenkamp, President, Israel and O'Connell, Members of the Court, (North-Eastern Division).

Native Law and Custom—Maintenance of married woman who, with the children, leaves her husband's kraal to reside at a kraal other than that of her dowry-holder.

Held: That where a Native, by payment of lobolo, made sufficient maintenance available for his wife and children at the kraal of the dowry-holder, and where another person removed the wife and children to his own kraal, without the first-mentioned's consent or knowledge, he cannot be heard to claim to be reimbursed the amount voluntarily and unnecessarily expended by him.

Appeal from the Court of the Native Commissioner, Zebediela.

Steenkamp (President), delivering the judgment of the Court:—

The plaintiff (now respondent) sued his son, the defendant (now appellant) in the Native Commissioner's Court for £100 being in respect of maintenance of defendant's wife and three children for a period of four years.

In his plea the defendant stated that William Kekana, the dowryholder of defendant's wife should have been sued as he had handed defendant's wife and children over to plaintiff.

The Native Commissioner decided the case according to Common Law and entered judgment in favour of plaintiff for £54 and costs, being maintenance reckoned at 10s. a month for each child for three years, which is the period he found plaintiff had supported the three children.

Defendant, who was unrepresented in the Court below, has now noted an appeal to this Court.

According to the record defendant married his wife in accordance with Native Law and Custom, and paid lobolo. He and his wife became estranged and she returned to her people. Here it should be mentioned that when a man pays lobolo he in fact makes provision for the maintenance of his wife and children in case she should leave, him, taking with her the children, and return, as she should do, to the dowry-holder's kraal. If she goes and lives with anybody else without the husband's permission, then the person who maintains her has no claim for " Isondhlo ". In the case of Mlentwa Mtetwa *v.* Nkala, 1937, N.A.C. (T. & N.) 157, it was decided that it is for the guardian (in this case the husband and defendant) to determine where his ward should reside and if she can show no valid cause why she should not comply with his wishes, then the person who chooses to take her into his kraal, knowing the guardian's wishes, cannot be heard in a claim for maintenance.

Similarly in the case of Mziza *v.* Japie, 1945, N.A.C. (T. & N.), at page 82, McLoughlin (P.) remarked that it is not an uncommon thing for a woman to quarrel with the husband or his representative and arbitrarily to betake herself wherever she likes without his approval. In these circumstances Native Custom does not contemplate any claim being made by the person with whom she takes up residence.

Those cases are mentioned as, in the case now on appeal, Native Law and Custom is interwoven with the claim which the Native Commissioner decided according to Common Law principles. This Court does not agree that Common Law should have been applied because in doing so a hybrid admixture of the two systems of law results. As mentioned earlier, the marriage was according to Native Law and therefore anything flowing therefrom should be decided under that system. One of the consequences of a customary union is the maintenance, out of the lobolo paid by the husband, of the wife and children after she leaves her husband.

The Native Commissioner has found proved the following facts:—

1. That defendant and his wife had a quarrel on or about 1st January, 1946, as a result of which defendant's wife eloped with their three children.
2. Defendant claimed the return of his wife and children from her gaurdian, William Kekana, but she did not return.
3. That Defendant's wife and children went and stayed with defendant's father soon afterwards, i.e. during January, 1946.
4. That, although defendant knew that his wife and children were already at his father's (plaintiff's) kraal he did not go and fetch her, nor did he support her or the children.
5. That defendant's wife and children lived at his father's (plaintiff's kraal for a period of three years.
6. That during this period plaintiff had to maintain defendant's wife and three children.
7. That during the period of three years defendant never objected against plaintiff maintaining his wife and children.

Fact 4 should, however, be amplified by adding thereto the fact that defendant took the necessary legal action by suing the dowry-holder for the return of his wife or the return of lobolo. This is all he was required to do.

It should also be added that according to the evidence defendant and his father, the plaintiff, were at enmity and had been so for several years before his wife deserted him. Native Law

requires that a husband's remedy is against the lobolo-holder whose duty it becomes to take steps for the return of the wife to the husband.

It is noted from the record that the wife is now living with her husband, the defendant, as they have become reconciled.

It follows from the above remarks that maintenance is not payable under Native Law and Custom.

Assuming that the Native Commissioner was correct in applying Common Law, then it is difficult to see under what rule of law or under what doctrine he decided the issue. *Negotiorum gestio* is not applicable as it is obvious that the woman was not in need of care. Counsel for respondent has raised this doctrine, but did not argue it seriously.

If we apply the law of maintenance, then reference to the case of Oberholzer *v.* Oberholzer, 1947, (3) S.A.L.R. 294, shows clearly that a claim for past maintenance cannot be entertained. In Spiro's work on the " Law of Parent and Child ", page 235, the author's reasoning is sound and it is apparent that he comes to the conclusion that a claim for arrear maintenance cannot be the subject of an issue.

Counsel for respondent has argued that the doctrine of unjust enrichment is applicable to the facts of the case and, in support of his argument, has quoted Fillis *v.* Joubert Park Private Hospital (Prop.) Ltd., 1939, T.P.D. 234, in which a father was held liable to a third party for necessaries supplied to his minor child who was in the custody of his ex-wife from whom he was divorced, even though the Court, in granting the divorce, had made an order for the payment of a fixed amount of maintenance by the father to the mother. The circumstances of the present case are, however, so different from those of that case as to distinguish it. Here appellant, by his payment of lobolo, made sufficient maintenance available for his wife and children at the kraal of the dowry-holder, and respondent, without the consent or knowledge of appellant, removed the wife and children from the kraal of the dowry-holder to his own kraal and there voluntarily maintained them. Respondent, in fact, deprived the wife and children of the maintenance supplied by appellant and substituted therefor maintenance supplied by himself; he cannot now be heard to claim to be reimbursed the amount voluntarily and unnecessarily expended by him.

Counsel has also urged that there was a tacit mandate by appellant to his father. This is not correct as at no time need appellant's conduct be interpreted to mean that he was agreeable to his wife and children living with the respondent.

Appellant, who was not represented by Counsel, argued that his father " stole " his wife and children from the place where they were residing according to Native Custom, and asked: " How can he pay a thief for looking after stolen property? " This naive and unsophisticated analogy by the appellant fittingly sums up the position.

The defendant might have been dilatory in suing the lobolo-holder for the return of his wife and children while they were living with his father, the plaintiff, but if a person undertakes of his own free will to maintain the wife of somebody else, knowing very well that her proper place was at her father's place, he cannot claim maintenance. There is no evidence that the woman was stranded and had nowhere else to go.

In the circumstances the appeal must succeed and the appeal is accordingly allowed with costs and the Native Commissioner's judgment is altered to read:—

" For defendant with costs."

Appellant: In person.

For Respondent: Adv. G. G. Hoexter, instructed by P. W. Roos, Esq., Pietersburg.

Decided cases referred to:—

Mlentwa Mtetwa *v.* Nkala, 1937, N.A.C. (T. & N.) 157.

Fillis *v.* Joubert Park Private Hospital (Prop.) Ltd., 1939, T.P.D. 234.

Mziza *v.* Japie, 1945, N.A.C. (T. & N.), 82.

Oberholzer *v.* Oberholzer, 1947, (3) S.A.L.R. 294.

CASE No. 63 OF 1950.

JOSEPH NGCANGO (Appellant) *v.* KRISTINA JELE, N.O. (Respondent).

(N.A.C. CASE No. 103/50.)

PRETORIA: Wednesday, 6th December, 1950. Before Steenkamp, President. Israel and O'Connell, Members of the Court. (North-Eastern Division).

Law of Succession—Native estates—Purchase of immovable property—Prescription.

Held: That where an estate falls to be administered under Native Law and Custom in terms of sub-section (*d*) of section 2 of Government Notice No. 1664 of 1929, the appointment of an executor is unnecessary and the estate, therefore, immediately devolves upon the heir.

Held: Further that the issue of a certificate of appointment is not a condition precedent to the enforcement by the heir of a claim in favour of the estate or the contesting of a claim against an estate. In other words, the ordinary rule of Native Law whereby the estate vests in the heir immediately on the death of the deceased is in no way altered or affected by the provisions requiring the issue of a certificate.

Appeal from the Court of the Native Commissioner, Pretoria.

O'Connell (Member), delivering the judgment of the Court:—

Respondent (plaintiff in the Court below), in her capacity as the representative in the estate of the late Martha Vilakazi, obtained judgment against appellant (defendant in the Court below), for transfer or portion A of Lot No. 88, Riverside, District Pretoria, in favour of the estate late Martha Vilakazi against payment of costs of transfer.

Appeal against this judgment has been noted on the following grounds:—

(1) The right of action is prescribed.

(2) The Deed of Sale does not comply with the Transfer Duty Ordinance of 1902.

(3) The finding of the Court to the effect that the description of the property sold was inserted in the Deed of Sale at the time of the drawing up and signature of the instrument is against the evidence and the weight of evidence.

The facts of the case are:—

(1) On the 7th July, 1928, the late Martha Vilakazi purchased from the appellant portion A of Lot No. 88, Riverside. The transaction is recorded in a document signed by the parties thereto and is worded as follows:—

"(*a*) The buyer will buy this stand for £35. Lot No. 88A, Riverside.

(*b*) The first instalment will be (£2. 2s. 0d.) stg. The monthly instalments will be £2. The first instalment will be paid on the 7th July, 1928.

(*c*) If the buyer is behind by one month and six days, the agreement for sale will expire, and will be entitled for the building and material only; and the seller will not refund the money."

(2) The purchase price was paid in full, the final payment being made on some date in 1931, subsequent to the 14th February, 1931, on which date the receipt for the penultimate payment was issued. The receipt in respect of the final payment does not bear a clear date.

(3) Martha Vilakazi died during 1935. The exact date of her death is unknown.

(4) Respondent, who is the daughter of the late Martha Vilakazi, was appointed representative of her mother's estate on the 9th November, 1949.

(5) Transfer of the property was first claimed on the 3rd November, 1949, and finally, after considerable correspondence had passed between the Attorneys for the parties, summons was issued on the 23rd May, 1950.

Appellant raised the following main defences to the claim:—

(1) The agreement of sale was void because the Deed of Sale did not comply with the provisions of the Transfer Duty Ordinance of 1902; and

(2) that, should it be found that a valid agreement had resulted, respondent's claim was prescribed.

Both defences were rejected by the Native Commissioner.

The first defence was raised because of the fact that the word " Riverside " is written in red ink and in a handwriting other that that of the appellant who had written all other entries on the document, some in green and some in blue-black ink.

At the hearing in this Court, Counsel for appellant submitted that the entry of the word " Riverside " had been made at some time subsequent to the signature of the document by the parties thereto and that, having regard to the decisions in Kourie *v.* Bean, 1949 (2) S.A.L.R., 567, and King *v.* Potgieter, 1950 (3) S.A.L.R., 7, the deed of sale was therefore a nullity. This Court, however, is not satisfied that the appellant has discharged the onus, which rested upon him, of proving his allegation that the word was subsequently entered.

The document, when handed in to Court, was in all respects complete and no reason can be found to alter the finding of the Native Commissioner on this point. The appeal on grounds 2 and 3, which are closely interwoven, must therefore fail.

On the plea of prescription, the Native Commissioner held (1) that the period of extinctive prescription had not expired at the time of Martha's death; and (2) that, because no representative of the estate had been appointed untill the 9th November, 1949, the estate was under a disability for the period from the date of death until the 9th November, 1949, and prescription was suspended during the period of disability in terms of Section 7 (1) (*b*) of Act No. 18 of 1943.

Counsel for appellant, in attacking the first of these decisions, urged that in terms of the judgment in Lamprecht *v.* Lyttleton Township (Pty.), Ltd., 1948, (4) S.A.L.R., 526, the date of accrual of the right to demand transfer was the 7th November, 1929, i.e. the date on which the last instalment should have been paid as provided in the Deed of Sale. From this he argued that the period of prescription had expired on the 6th November, 1935, and before the 31st December, 1935, the date accepted by the

Native Commissioner as the date of Martha's death. But, even if it could be conceded that Martha was alive on the 6th November, 1935, in this he is wrong because defendant accepted payment of the instalments after due dates and his voluntry extension thereby of the agreed period makes the date of accrual of the right to claim transfer the date on which he accepted the last payment. This date, as has been shown, was in 1931, and the period of prescription, therefore, ran until some time in 1937, some considerable time after Martha's death. The Court, therefore, rejects this contention.

In regard to the ruling that prescription had been suspended from the date of Martha's death until the appointment of her estate, it was urged by Counsel for appellant that death did not suspend prescription, that the Act did not afford any protection to a deceased estate where it is the creditor and must be construed strictly and, that in terms of section *twenty-three* (6) of the Native Administration Act, No. 38 of 1927, the heir required no formal appointment to enable him to bring his claim.

Counsel for respondent, on the other hand, pressed the Court with the argument that death suspends prescription because rights inhere only in juristic persons and that, on the authority of Voet 29:2:3, an estate is, pending the appointment of an executor a *res nullius* and is, therefore, not a legal *persona*. The Prescription Act specifically defines a "creditor" as a "person". The estate was, until the appointment of the representative, under a disability and, therefore, prescription of the claim was suspended for that period.

The estate of the late Martha Vilakazi falls to be administered under Native Law and Custom in terms of sub-section (*d*) of section 2 of Government Notice No. 1664 of 1929, as it read at the time of the death of deceased. The subsequent amendment of the section by Government Notice No. 939 of 1947 does not alter the position. By section 4, sub-section (1) of the same Government Notice the appointment of an executor is unnecessary and the estate, therefore, immediately devolves upon the heir. Provision is made in the sub-section for the appointment of a representative of the estate "in any case where it becomes necessary to pass transfer to any person of immovable property, not being land in a location held under quitrent conditions, registered in the name of the deceased."

This provision exists, however, merely to enable the reprsentative to perform those executive acts necessary to enable transfer of the immovable property to be passed. The issue of such a certificate of appointment is not a condition precedent to the enforcement by the heir of a claim in favour of the estate or the contesting of a claim against the estate. In other words, the ordinary rule of Native Law whereby the estate vests in the heir immediately on the death of the deceased is in no way altered or affected by the provision requiring the issue of a certificate in the circumstances quoted. Section *twenty-three* (6) of the Native Administration Act, No. 38 of 1927, is not of application in this case and refers only to the circumstances governed by section *twenty-three* (5) of the Act.

The Court is, therefore, not at one with Counsel for respondent in this respect.

This Court finds that there has been no period during which the creditor, i.e. the heir to the estate, has been under disability and holds that the claim is prescribed. In the result, the appeal on ground 1 of the Notice of Appeal is upheld with costs, and the judgment of the Court below is altered to read—"For defendant with costs".

Steenkamp (President).

I have read the judgment of my brother O'Connell and I agree that the appeal should be allowed.

I wish to emphasize that section *twenty-three* (5) of the Native Administration Act, read with sub-section (6), makes it clear that no appointment of an executor is necessary if a non-Native is either the creditor or the debtor of a deceased Native and the heir may proceed or be proceeded against, without such formal appointment immediately after the death of the deceased.

According to Native Law and Custom, which is the only law applicable, the property of a deceased Native devolves on the heir immediately on death. Sub-section 7 (*a*) of section *twenty-three* reads clearly to the effect that the estate of any Native who has died leaving no valid will, falls to be administered under the provisions of the Native Administration Act. Sub-section (1) empowers the Governor-General to make regulations not inconsistent with the Act, prescribing the manner in which the estates of deceased Natives shall be administered and distributed. Regulations were issued under Government Notice No. 1664 of 1929, as amended by Government Notice No. 939 of 1947. Section 2 of these regulations prescribes that property not falling within certain categories shall be distributed according to Native Law and Custom. The property concerned in the present case does not fall within the exceptions mentioned in the regulations, and therefore Native Law and Custom applies.

It should be mentioned that Native Law so differs from our Common Law that decisions under Common Law can hardly be applied to a Native estate of the nature now before the Court. Native Law goes so far (except in Natal where a Code applies) as to hold an heir liable for the debts incurred by the deceased, irrespective of whether he inherited anything. He becomes liable *ipso jure* on the death of the deceased and as mentioned by my brother O'Connell, letters of administration are not necessary, and where provision is made for the issue of such letters, their issue is only necessary to empower the heir to carry out acts which are of an executive nature.

Israel (Permanent Member):

I concur.

For Appellant: Adv. D. K. Mann. instructed by Messrs. Drutman & Salakoff, of Pretoria.

For Respondent: Adv. G. G. Hoexter, instructed by Messrs. Saperstein & Kuyper, of Pretoria.

Cases referred to:—

Kourie *v.* Bean, 1949 (2) S.A.L.R. 567.

King *v.* Potgieter, 1950 (3) S.A.L.R. 7.

Lamprecht *v.* Lyttleton Township (Pty.) Ltd. 1948 (4) S.A.L.R. 526.

Statutes, etc., referred to:—

Native Administration Act, No. 38 of 1927, section *twenty-three* (5) and section *twenty-three* (6).

Government Notice No. 1664 of 1929, section 2 (*d*), as amended by Government Notice No. 939 of 1947, and section 4 (1).

Prescription Act, No. 18 of 1943, section 7 (1) (*b*).

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(North-Eastern Division)

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